



CASE NO. 88-INA-184

IN THE MATTER OF:

PROSPECT SCHOOL,
Employer,

on behalf of

SHEILA MARY SINGLETON,
Alien,

BEFORE: Litt, Chief Judge; Vittone, Deputy Chief Judge; and Brenner, DeGregorio, Guill,
Schoenfeld, and Tureck
Administrative Law Judges

JAMES L. GUILL
Administrative Law Judge

DECISION AND ORDER

The above-named employer requests review pursuant to 20 C.F.R. §656.26 of the United States Department of Labor Certifying Officer's denial of labor certification application. This application was submitted by the Employer on behalf of the above-named Alien pursuant to Section 212(a)(14) of the Immigration and Nationality Act, 8 U.S.C. §1182(a)(14) (the Act).

Under Section 212(a)(14) of the Act, an alien seeking to enter the United States for the purpose of performing skilled or unskilled labor is ineligible to receive labor certification unless the Secretary of Labor has determined and certified to the Secretary of State and to the Attorney General that, at the time of application for a visa and admission into the United States and at the place where the alien is to perform the work: (1) there are not sufficient workers in the United States who are able, willing, qualified, and available and (2) the employment of the alien will not adversely affect the wages and working conditions of United States workers similarly employed.

The procedures governing labor certification are set forth at 20 C.F.R. §656. An employer who desires to employ an alien on a permanent basis must demonstrate that the requirements of 20 C.F.R. §656.21 have been met. These requirements include the responsibility of the employer to recruit U.S. workers at the prevailing wage and under the prevailing working conditions through the public employment service and by other reasonable means in order to make a good faith test of U.S. worker availability.

This review of the denial of labor certification is based on the record upon which the denial was made, together with the request for review, as contained in an Appeal File [AF herein] and any written arguments of the parties. 20 C.F.R. §656.27(c).

STATEMENT OF THE CASE

Employer, Prospect School, filed an application for alien labor certification on November 25, 1986, on behalf of the Alien, Sheila Mary Singleton, for a position as an elementary school teacher. On August 4, 1987, the Certifying Officer (C.O.) issued a Notice of Findings (N.O.F.) which proposed to deny certification on the basis of §656.21(b)(7) which requires that U.S. workers not be rejected for other than lawful, job-related reasons and on the basis of §656.21(b)(2) which requires that the job opportunity be described without unduly restrictive requirements.

On August 28, 1987, Employer filed its rebuttal to the N.O.F. On September 19, 1987, The C.O. issued a Final Determination denying certification on both of the grounds proposed in the N.O.F. Employer filed its request for review on October 13, 1987.

DISCUSSION

Certification was denied because the C.O. determined: 1) that the U.S. applicant, Mary A. Rouhier, was qualified for the position and should not have been rejected without an interview, and 2) that Employer had included an unduly restrictive requirement for the position during recruitment. For the reasons set forth below the C.O.'s determinations are reversed and certification is hereby granted.

Rejection of the U.S. Worker

The Board has held that ". . . where an applicant's response to an employer's advertisement fails to show that the applicant meets the minimum requirements for the job, the employer may reject the applicant on the basis of the response alone, in the absence of additional relevant information from other sources or a reasonable request by the Certifying Officer that the applicant be interviewed." In re Anonymous Management, 87-INA-672 (September 8, 1988). Therefore, the Board must determine whether Ms. Rouhier's resume fails to show that she meets the minimum requirements for the job. If her resume shows that she does not meet the minimum requirements for the job, Employer's rejection was lawful unless the resume is contradicted by additional relevant information from other sources or the C.O. reasonably requested that she be interviewed.

Employer's minimum requirements for the job, as stated in its advertisement, are a Master's degree and two years of experience teaching grades 4 through 6 (AF 42).¹ These

¹ The experience requirement was originally listed as five years in the ETA 750A form but was lowered to two years at the request of the California Employment Development
(continued...)

requirements were not challenged by the C.O. Therefore, Employer was justified in relying on them as a standard by which to judge applicants. In re Microbilt Corp., 87-INA-635 (January 12, 1988).

Employer stated that Ms. Rouhier was not qualified for the job offered because "[s]he does not have experience teaching 4th, 5th, or 6th grades; all her experience has been with mentally retarded, disabled, or disadvantaged youths." (AF 25). An examination of Ms. Rouhier's resume (AF 96) supports Employer's statement. Except for her experience as substitute teacher, which does not demonstrate that she has the required experience, all of Ms. Rouhier's experience has been in teaching disadvantaged groups. Specifically, she taught educationally disadvantaged youths, court-committed youths, and children with gross- and fine-motor skill problems. In fact, the only credential listed in Ms. Rouhier's resume is that she has applied for a California teaching certificate. In short, Ms. Rouhier's resume shows that she does not have the required two years of experience teaching grades 4 through 6. Therefore, in the absence of additional relevant evidence from other sources or a reasonable request from the C.O. that she be interviewed, Employer could lawfully reject Ms. Rouhier on the basis of her resume.

In the Final Determination, the C.O. found that Ms. Rouhier was rejected for other than lawful, job-related reasons because she was not interviewed, stating that "[a] person who possesses Ms. Rouhier's background should have certainly been afforded at least an interview. . . ." (AF 7). At first blush, such a statement might seem like a reasonable request that the applicant be interviewed. However, in the N.O.F. the C.O. stated as follows:

This is not to be considered a request for the employer to attempt to re-contact or re-interview the above applicant. Documentation must be provided showing that the applicant was not qualified, willing or available at the time of initial consideration and referral.

(AF 11). Clearly, the C.O. instructed Employer not to interview Ms. Rouhier. Therefore, the C.O. may not deny certification because she was not interviewed.

The only additional relevant information available to the C.O. was a questionnaire which was sent to Ms. Rouhier on June 26, 1987. In the N.O.F., the C.O. quoted the following from Ms. Rouhier's response:

I sent a resume. I think the employer could tell that I was over 40 years of age and may have discriminated on the basis of age. I have clear California credentials in K - 12, elementary and learning handicapped, an MA, and 12 years of experience. I was never called in for an interview.

(AF 16). Apparently, the C.O. found Ms. Rouhier was unlawfully rejected either because he believed that age discrimination played a part in Employer's decision or because he believed Ms.

¹(...continued)
Department (AF 48).

Rouhier's statement about having clear California credentials. However, the record is completely devoid of evidence to support Ms. Rouhier's contention that she was the victim of age discrimination. Consequently, that assertion may not serve as a basis for the denial.

On the other hand, Ms. Rouhier's statement that she had "clear California credentials" may have been enough for the C.O. to reasonably request that she be interviewed. This statement is in conflict with her resume which stated that she had only applied for a California teaching certificate (AF 96). Such a conflict may serve as the basis for a C.O. to reasonably request that an applicant be interviewed. However, as noted above, the C.O. instructed Employer not to conduct an interview. Therefore, because the C.O. did not reasonably request that the applicant be interviewed and no additional relevant evidence was sufficient to contradict that Ms. Rouhier does not meet Employer's unchallenged minimum requirements for the job, Employer's rejection was not for other than lawful, job-related reasons in violation of §656.21(b)(7).

Unduly Restrictive Requirement

In the N.O.F., the C.O. proposed to deny certification because he found that Employer had included an unduly restrictive requirement during recruitment. According to the C.O., Employer's requirements had included "British primary teaching methods" and that requirement was unduly restrictive in violation of §656.21(b)(2) (AF 15).

In rebuttal Employer stated that "British primary teaching methods" was not a requirement for the job; rather "applicants must be willing to adopt our approach to teaching. . . ." (AF 12). In support of its argument, Employer stated that it has not rejected any applicant on the basis of a lack of knowledge, background, or experience, and that it has been willing to hire and train someone who lacks such a background (AF 12). Additionally, Employer cited its ETA 750A form which does not list "British primary teaching methods" as a requirement in either Item 14 or 15 (AF 12, 21).

In the Final Determination, the C.O. considered Employer's arguments but was not persuaded that "British primary teaching methods" was not a requirement, stating as follows:

The employer is reminded that the advertisement reads: "Teach grades 4 through 6 in a progressive private school which uses British primary teaching methods." This is the opening line of the advertisement, and while the employer claims no applicant was rejected for not possessing this background, the requirement is prominent and has the potential to be a deterrent.

(AF 6).

We disagree with the C.O.'s finding that "British primary teaching methods" was a requirement. As stated by Employer, the record is devoid of evidence to suggest that any applicant was rejected on the basis of a lack of such a background, and Employer has not listed it as a requirement in the ETA 750A form. More important, however, is our disagreement with the C.O.'s interpretation of Employer's advertisement which reads in pertinent part as follows:

TEACHER teach grades 4-6th in progressive private schools with [sic] uses British primary teaching methods. Use creative methods and discovery teaching methods. Plan curriculum, text and materials. Must have M/A & min 2 years experience teaching grade 4-6th.²

(AF 42). The C.O.'s reading of the advertisement which makes "British primary teaching methods" a requirement simply because it appears in the first sentence is too narrow. Read in its entirety, the advertisement cannot be construed to mean that "British primary teaching methods" is required. The requirements are clearly spelled out as a Master's degree and two years of experience teaching grades 4 through 6. The C.O.'s determination to the contrary cannot be upheld. Therefore, because "British primary teaching methods" is not a requirement, it cannot be unduly restrictive in violation of §656.21(b)(2).

ORDER

Accordingly, the C.O.'s determinations are hereby REVERSED and certification is GRANTED. It is so ORDERED.

At Washington, DC

Entered: DEC 22, 1988

James L. Guill
Administrative Law Judge

² As the remainder of the advertisement concerns the salary offered and instructions on how to apply for the job, it is not germane to our discussion here.